United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL
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OF SERVICE

76-1409

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against -

JACK LEVINE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

The Defendant-Appellant, JACK LEVINE, was charged in a three-count indictment with tax evasion (J.A. 3-5).* The indictment was returned on May 24, 1976 (J.A. 1), and went to trial before Judge Dudley B. Bonsal and a jury on July 13, 1976 (J.A. 2), only seven weeks later (J.A.2). The case went to trial over the strenuous objections of defense counsel and earnest requests for an adjournment of only a day for additional necessary trial preparation.

The first count charges that Jack Levine conspired with Martin Frank and David Kolatch to file a false income tax return for himself and his wife for the calendar year 1969. The second

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* Unless otherwise indicated, references are to pages of the Joint Appendix.

count charges that he evaded income taxes for that year in the amount of $8,300. Count three charges him with making a false statement in his tax return.

At the close of the Government's case, Judge Bonsal dismissed the first count for lack of proof (J.A. 2, Trial transcript p. 338). The jury was deadlocked on counts two and three (J.A. 258), but after egregiously erroneous instructions from the trial Judge on restricted stock, plus extensive colloquys with him, was coaxed into a verdict of guilty.

On September 7, 1976 Judge Bonsal imposed a sentence of three months on count two, plus probation for two years on count three, to begin at the end of the sentence on count two, and a fine of $3,000. on each of these two counts for a total of $6,000., payable in six months (J.A. 2). Jack Levine filed his notice of appeal the same day (J.A. 9).

ISSUES PRESENTED FOR REVIEW

(1) Did the trial Judge erroneously lead the jury to believe that Jack Levine's restricted stock was negotiable and had substantial value?

(2) Did the trial Judge err in refusing to let the jury hear Martin Frank's subornation of perjury tapes?

(3) Was it error for the trial Judge to deny the request of defense counsel made in good faith for an adjournment of only a day for further necessary trial preparation?

STATEMENT OF THE CASE

Martin Frank, a lawyer who did time in prison and resigned from the bar, and David Kolatch, the administrator of the Hillel School, Lawrence, Long Island, devised a plan for raising funds for the building of a high school by the sale of back-dated gifts of restricted stock. The stock came from Martin Frank's clients.

Jack Levine was in no way a part of this plan, but he was one of Martin Frank's clients whom Frank approached. At the solicitation of Frank, Levine agreed to give 16,666 shares of the stock of Salem Electronics to the Hillel School. The stock was restricted.

Martin Frank had been Jack Levine's lawyer, counsellor and friend for 18 years (J.A. 171-77). They saw each other frequently, both professionally as well as socially. On one occasion, Frank with his son and Levine with one of his sons went down to Florida, combining business with some recreational time with their children (J.A. 177).

Frank himself prepared the letter of transmittal for Levine's 16,666 shares of stock to the Hillel School. Frank did this in his own office. On direct examination Frank testified:

Q Now, prior to Mr. Levine's arriving with his stock certificate had you prepared a letter?

A I prepared a letter which contained information

concerning the gift, to wit, the name of the company the number of shares and the certificate number, addressed fro the donor Mr. Levine to the Hillel School.

I also called up Mr. Kolatch and gave him the same information and told him to prepare an acknowledgment letter, acknowledging receipt of the gift.

* * * * * *

Q. After you received the stock from Mr. Levine and after you prepared the letter and he signed it, what did you do next?

A. I called up Mr. Kolatch and told him that the stock was in my office, the letter was signed and that I would deliver it to him (J.A. 41-42).

Frank then took the letter with Levine's stock certificate and handed them to Kolatch at the Hillel School (J.A. 45-46).

The letter of transmittal had the date May 26, 1969; the letter of the Hillel School acknowledging receipt of the stock had the date May 28, 1969 (J.A. 42, 120, 125, 127).

Martin Frank in the course of promoting his scheme told Kolatch that he "knew certain charitable institutions were obtaining donations of unregistered securities by accommodating the donor in giving him a letter accepting the donation at a date that the donor would pick, thereby enabling the donor to get the benefit of the largest gift tax deduction possible." (J.A. 33).

(J.A. 46), more than a year later.

As a clincher Frank told his client and friend Levine "that by doing this type of donation, the tax benefit would far exceed the possible gain he could make by selling the stock for cash, if he could sell it, since it was restricted. He couldn't even sell that to realize the cash, but that his cash saving on his taxes would far exceed what he could receive for the sale of the investment stock." (J.A. 37-38). Jack Levine ended up letting himself be victimized.

Jack Levine's testimony was of course at odds with that of the government's principal accuser against him, his old friend, counsellor and lawyer, Martin Frank. Levine remembered the gift of the 16,666 shares as being in 1969 (J.A. 188). Frank placed it in March, 1970 (J.A. 46, 66). Also Levine was sure that he left some of his stationery signed in blank with Frank (J.A. 175-76), and that Frank then typed in the appropriate letter. Frank did not recall this (J.A. 104), and specifically stated that the letter which he had prepared for Levine to sign for the gift to the Hillel School was not written after Levine signed it (J.A. 62).

The jury was deadlocked. During the course of its deliberations it sent this note to the Judge: "With reference to the restricted stock certificate, at what point under what conditions would it or could it have become negotiable and therefore

valuable to Mr. Levine?" (J.A. 244). There ensued one of the longest series of colloquys between judge and jury that the writer has ever seen. Here is part of it:

"* * * On that it might help if I quote from the transcript here, the testimony of Mr. Merendino. You remember he was the man from the Chemical Bank who signed the guarantee on behalf of the Chemical bank.

On page 211 of the transcript appears the following:

'Q With reference to the back does your signature appear on the back?

'A Yes, sir.

'Q Where is that?

'A The lower guarantee signature.

'Q What appears above that in terms of the stamp?

'A My stamp.

'Q Yes?

'A It is a signature guarantee stamp by the Chemical Bank and I sign on that as an authorized signer for the Chemical Bank.

'Q Can you describe what this process is on the back with three signatures?

'A Okay. Working from the bottom up,

I guarantee the signature of Mr. Samuel Weisberger who is the individual who guaranteed under the name of Continental Securities Company and who in turn guaranteed Mr. Jack Levine, Jack Levine's signature.

'Q What does this guaranteeing process mean? What is the significance of that? Why is it done?

'A In order to make a stock certificate negotiable either for sale or transfer the owner must have the certificate guaranteed either by a member firm or a bank.

'Q What do you mean by a member firm?

'A This is a firm such as Merrill Lynch that can guarantee --

'THE COURT: When you talk about a member firm are you referring to being a member of the New York Stock Exchange?

'THE WITNESS: Yes, of the New York Stock Exchange.

'Q Is Chemical Bank a national bank; in other words, your bank can guarantee?

'A Yes.

'Q Aside from the endorsing of the back of the certificate to make it negotiable, is there any

document, any other document that could also make the certificate negotiable?

'A Yes, quite often the stock powers are used in lieu of the back of the certificate being signed.'

I don't think that applies because we haven't a stock power.

Does that answer the question about the stock being negotiable?

JUROR NO. 3: That causes me to be more confused. The stock as we understand it was restricted.

THE COURT: That is right.

JUROR NO. 3: Now, does that mean and as far as I understand restricted stock doesn't it have to be held for a certain period of time?

THE COURT: Well, I don't know as to any time. One year maybe.

JUROR NO. 3: However, Mr. Merendino said that once the signature is guaranteed it is negotiable. Therefore, stock could be restricted stock and might be presented for a guarantee a week after it is given to somebody and be negotiable?

THE COURT: As restricted stock.

Do you have the stock certificate in the jury room?

After the jury indicated to the trial Judge that it was

No. Because I think if you had it you would observe on the stock certificate also a stamp?

JUROR NO. 3: Not as ordinary stock.

THE COURT: That is right.

JUROR NO. 10: The point is restricted stock could be sold and a profit be realized at that point, not knowing enough about restricted stock. When could it be valuable to somebody?

THE COURT: I think I can answer that this way. Stock always has some value. Restricted stock has less value.

If you have restricted stock there are proceedings you can take to get it unrestricted if you want to. As I understand it, restricted stock is really purchasing it for investment.

Stock that you purchase for investment, you could give it to somebody else who is also taking it for investment. There is no problem on that." (J.A. 244-48).

* * *

"JUROR NO. 12: Getting back to the unrestricted stock, at what point is it negotiable? I don't know.

THE COURT: It becomes negotiable when the process is carried out whether restricted or unrestricted, it becomes negotiable. That is, you can transfer it

but the fellow who gets the certificate would have that stamp on it.

JUROR NO. 12: If I own a certificate of unregistered stock and move it into the marketplace and get whatever price there is available to me I will do that and probably lose something on it but I can do that.

THE COURT: It depends on how you do it. If it is signed and you give it to a friend of yours or someone else he can have that stock for investment and here it is, if he takes it he is going to take it on the same restriction as you do.

MR. BERGER: May I appraoch the side bar one second?

THE COURT: All right.

(At the side bar.)

MR. BERGER: Your Honor, I am not going to try to contravene you in any way but I have been practicing securities laws for many years and there are definite laws and rules on this and they are very confused.

THE COURT: There is no evidence. I can't tell them that.

MR. LITTLEFIELD: I think if we have an opportunity to look there is something in evidence, something

on restricted stock.

THE COURT: All right.

(In open court.)

THE COURT: The lawyers think there may be something in the minutes on restricted stock and why don't you go back and continue deliberations and when we find it we will call you back in.

(Jury left the courtroom at 3:50 p.m.) (J.A. 249-50).

* * *

(Jury returned to the courtroom at 4:00 p.m.)

THE COURT: The lawyers have been working on this and I have two things I might add to help you a bit.

First of all it is Exhibit No. 8, which is the stock certificate itself and I am going to send that in to you so you will have it and the stamp with respect to restricted stock comes from there.

The stamp reads:

'The shares represented by this certificate have not been registered under the Securities Act of 1933. The shares have been acquired for investment and may not be sold, transferred, pledged or hypothecated in the absence of an effective registration statement for the shares under the Securities Act of 1933 or an opinion of counsel

of the company that registration is not required under said Act.'

That is what the stamp says. They have that and the testimony of Mr. Kolatch at page 145 appears the following questions and answers:

'Q Referring to Government's Exhibit 8, the stock certificate, when you received it was it in the same form as it is now?

'A Yes, it is the actual stock. It has the stock power on the back plus signed signature guarantee, so that all the stock that was delivered to us either had stock powers accompanying it or the actual stock itself signed.

'Q Why was that?

'A So that we could market the stock. Otherwise it had no value to us unless we could do something with it, except that this stock was restricted stock and we were not able to sell this immediately.

'Q Did you keep it in possession of the school?

'A I held it, actually, in the possession of my own office for a period of time. I ultimately tried to do something with it, but the value of the stock was almost nil. We did not do anything

with the stock.'

I give you that and will send the exhibit in to you.

JUROR NO. 10: At the time he received the stock could he sell the stock at that time?

THE COURT: From the stamp, if he got an opinion of counsel of this company that he could, he could have done so or he could have gotten the Salem Company to file a registration statement. There are two possibilities there.

Of course, I think itwould be fair to say and it is true that if you have some restricted stock and you told a friend of yours that this is restricted stock, do you want it, in a private transaction, and he said he would like it you could transfer this stock to him because it would be purely a private transaction for investment, so long as you told him that he couldn't sell it through a broker.

JUROR NO. 11: The point is the stock can be disposed of under certain circumstances.

THE COURT: That is right. You are quite right. It becomes negotiable in that point of view subject only to the stamp.

JUROR NO. 3: But it cannot be converted into cash.

THE COURT: It could under those circumstances.

Supposing if you have a private transaction not involving a broker and you say to somebody you have this stock and it is restricted, there is no registration statement and I want to sell it and it might be good for somebody later on, when you pay for the stock and transfer it there is nothing illegal so long as you are clear that you know what you are doing and buying it for i .vestment.

(The jury left the courtroom at 4:05 p.m.)

MR. BERGER: If your Honor please, at this time we are going to take exception to any of the colloquy or any of the discussions had with the jury and the Court.

THE COURT: You have an exception.

MR. BERGER: Thank you, your Honor." (J.A. 253-56).

Shortly before 5:00 o'clock Friday afternoon, July 16, 1976 the jury sent the Judge a note that it was deadlocked (J.A. 258). The jury returned to the court room and the Judge now tried to steer it away from issues of the negotiability or transferability of restricted stock. The minutes reflect:

"(Jury returned to the courtoom at 4:50 p.m.)

THE COURT: Ladies and gentlemen, I have received your note just now indicating that you are deadlocked.

I don't want to know who voted on what side

or anything like that but a couple of thoughts I would like to leave with you.

I know you have gotten into a great deal of trouble about this restricted stock and I'm not sure that really is a very basic issue here because the issues in Count 1 is tax evasion, regardless of whether the stock could be sold, did the defendant get an advantage by claiming a tax deduction in 1969 for a gift he didn't make until 1970 and whether the tax saving which as I recall it was $8300 some-odd was a substantial tax saving. I instructed you about all that this morning.

In Count 2 the issue was again related to if he had reported in his 1969 return a gift to the Hillel School which he hadn't made until 1970, then his statement in his tax return that he made it in 1969 was false. Those are the issues.

The Government contends that is what happened. The defendant denies it. Those are really the basic issues here. (J.A. 258-59).

* * *

"MR. KATZ: We are going to continue our objections to the Court's charge.

THE COURT: You have an exception and I will be down at 5:30." (J.A. 260)."

The jury continued its deliberations until 6:35 P.M., and adjourned until 10:00 o'clock Saturday morning. (J.A. 261-62). On Saturday morning the jury resumed its deliberations. Toward noon on that day it reached a verdict of guilty. (J.A. 276).

ARGUMENT

POINT I

THE TRIAL JUDGE ERRONEOUSLY LED THE JURY TO BELIEVE THAT JACK LEVINE'S RESTRICTED STOCK WAS NEGOTIABLE AND HAD SUBSTANTIAL VALUE.

The jury during the course of its deliberations wanted to know from the trial judge at what point and under what conditions would or could Jack Levine's restricted stock "become negotiable and therefore valuable to Mr. Levine." (J.A. 239, 244). First the trial judge read from the testimony of Joseph Merendino, a vice president of the Chemical Bank, who guaranteed Levine's signature on behalf of the bank, that Levine's guaranteed endorsement made his stock certificate negotiable. (J.A. 244-46).

Then the trial Judge asked the jury whether this answered its question. Juror No. 3 responded that the reading caused him to be even more confused and asked whether restricted stock had to be held for a certain period of time. The trial Judge gave it as his opinion: "One year maybe." (J.A. 246-47).

But the trial Judge was wrong. If there ever was a one-year holding rule it became obsolete with Crowell-Collier Publishing Co., Sec. Act Rel. 3825 (1957).

Moreover, Jack Levine acquired his 16,666 shares of restricted stock as a broker and he probably could not have disposed of his shares at all: he could have sold them only through

a registered offering. Jack Levine was therefore right when on cross-examination in response to a comment and a question from the court he described his certificate for 16,666 shares of stock as merely paper:

"THE COURT: Hold it. Relax.

The stock was worth $287,000. I think you used the term 'unregistered stock.'

THE WITNESS: Yes, your Honor, it's paper.

THE COURT: From your point of view that's paper?

THE WITNESS: Yes, sir.

THE COURT: Okay."

(J.A. 215).

Also, government witness Richard Charles testified that Levine had told him that the certificate for 16,666 shares "has little value to him because it was unregistered stock and, therefore, to somebody else it might have some value and for him to get the present benefit of the contribution, plus the future benefit, it was worth it and that is what made it credible to me." (Trial transcript p. 241).

Had there been any such rule as the one-year holding rule that the trial Judge stated, then Levine's stock would have been free stock; for Levine testified that he got the stock in February, 1969 (J.A. 180), and Martin Frank testified that the gift of the stock to the Hillel School occurred in March 1970

(J.A. 46), more than a year later.

But Levine's stock was not free stock. If there ever was such a thing as a one-year holding rule, it long ago became obsolete. Furthermore, it would never have been applicable to Levine's stock.

The one-year holding rule mystique arose after a 1938 opinion of the General Counsel of the Commission in which he expressed the view that retention of the securities for as long as a year "would create a strong inference that they had been purchased for investment." As quoted in 1 L. Loss Securities Regulation, 668 (2d ed. 1961). Thereafter many securities lawyers advised their clients that holding for one year with no predetermined scheme or intention to resell was sufficient.

However, in his 1938 opinion the General Counsel had added that even the inference of which he spoke would fall "in the face of evidence of a pre-arranged scheme to effect a distribution at the end of the year." Nearly 20 years later the Commission elaborated on this caveat in its Crowell-Collier report:

> Holding for the six months' capital gains period of the tax statutes, holding in an "investment account" rather than a "trading account," holding for a deferred sale, holding for a market rise, holding for sale if the market does not rise, or holding for a year, does not afford a statutory basis for an exemption and therefore does not provide an adequate basis on which counsel may give opinions

or businessmen rely in selling securities without registration.

Purchasing for the purpose of future sale is nonetheless purchasing for sale and, if the transactions involve any public offering even at some future date, the registration provisions apply unless at the time of the public offering an exemption is available. Crowell-Collier Publishing Co., Sec. Act Rel. 3825 (1957) 7-8.

In affirming the disciplinary action taken by the Commission against one of the broker-dealers in the Crowell-Collier case, the Second Circuit held:

> The catalytic circumstances were the failure, noted by Gilligan, of Crowell-Collier to increase its advertising space as he had anticipated that it would. We agree with the Commission that in the circumstances here presented the intention to retain the debentures only if Crowell-Collier continued to operate profitably was equivalent to a "purchased [sic] * * * with a view to * * * distribution" within the statutory definition of underwriters in §2(11). To hold otherwise would be to permit a dealer who speculateively purchases an unregistered security in the hope that the financially weak issuer had, as is stipulated here, "turned the corner," to unload on the unadvised public what he later determines to be an unsound investment without the disclosure sought by the securities laws, although it is in

precisely such circumstances that disclosure is most necessary and desirable. The Commission was within its discretion in finding on this stipulation that petitioners bought "with a view to distribution" despite the ten months of holding. Gilligan, Will & Co. v. SEC, 267 F. 2d 461, 468 (2d Cir. 1959), aff'g Gilligan, Will & Co., Sec. Ex. Act Rel. 5 689 (1958) 8-9, cert, denied, 361 U.S. 896 (1959).

Then there arose a two-year holding rule mystique, and a three-year holding rule mystique. There was even talk about a five-year rule. Former SEC Chairman Manuel F. Cohen observed that a presumption of an investment intent might arise after a holding of two years. This statement was termed the Cohen two-year rule. See The Wheat Report at 165.

In United States v. Sherwood, 175 F. Supp. 480, 483 (S.D.N.Y. 1959), where the court may have been influenced by the necessity in a criminal contempt proceeding of proving beyond a reasonable doubt that the defendant's transactions had violated the court's injunction, Judge Sugarman held: "The passage of two years before the commencement of distribution of any of these shares is an insuperable obstacle to my holding that Sherwood took these shares with a view to distribution thereof, in the absence of any relevant evidence from which I could conclude he did not take the shares for investment." Now securities attorneys began to advise their clients that they were free to sell investment securities after the passage of two years. See e.g. Victor &

Hedrick, Private Offering: Hazards for the Unwary, 45 Va. L. Rev. 869, 874 (1959). However, with the publication by the Commission of no-action letters for the first time in the early 1970's it became apparent that the staff had taken the position that, absent an unforeseen change of circumstances, a passage of nearly three years was necessary before no-action letters would be granted.

One commentator suggested a three-year holding period, Schneider, Acquisitions Under The Federal Securities Laws -- A Program for Reform, 116 U. Pa. L. Rev. 1323, 1337 (1968). Even a five-year holding period was considered acceptable by some "members of the Commission staff." The Wheat Report at 165.

In 1972 the Commission adopted rule 144. In Rule 144(d) (1), 17 C.F.R. §230, 144(d) (1) (1972), the Commission gave some recognition to a minimum holding period of two years, but along with several other conditions. Moreover, the Commission made it clear that the two-year holding period was definitive only in transactions made pursuant to Rule 144. Jack Levine's gift of the 16,666 shares to the Hillel School occurring either in 1969 or 1970 predated Rule 144, and even if Rule 144 had been in existence Levine's stock would not have fallen within it.

The jury apparently equated restrictive stock with innocence; and negotiable stock, free stock, stock with value, with guilt. The trial Judge tried to persuade them that Levine's stock was negotiable and had value (J.A. 247-56). Defense counsel excepted (J.A. 256).

After the jury indicated to the trial Judge that it was deadlocked, he tried to persuade it that the restricted stock issue was really not important, saying: "I know you have gotten into a great deal of trouble about this restricted stock and I'm not sure that really is a very basic issue here ***." (J.A. 258).

In his instruction to the jury and colloquys with it during its deliberations, the trial Judge for all practical purposes entered the jury box himself. But as the court observed in United States v. Estep, 151 F. Supp. 668, 669 (N.D. Tex. 1957), aff'd, 251 F. 2d 579 (5th Cir. 1958): "The judge of the lower court must keep out of the jury box ***." For an apt illustration where the trial judge's intrusion into the jury's realm resulted in a reversal of the conviction, see Bihn v. United States, 328 U.S. 633 (1946).

POINT II

THE TRIAL JUDGE ERRED IN REFUSING TO LET THE JURY HEAR MARTIN FRANK'S SUBORNATION OF PERJURY TAPES.

On direct examination Martin Frank, the friend, counsellor and lawyer of eighteen years' standing of the defendant, Jack Levine, and the government's principal witness against him, with prosaic monotony admitted to all manner of offenses: conspiracy to violate the securities law (J.A. 25), tax evasion (J.A. 25, 52), embezzling the securities of a client (J.A. 54), lying (J.A. 54), and attempted subornation of perjury (J.A. 54). He related that upon conviction for conspiracy to violate the securities law he received a sentence of two years in prison and a $2500. fine (J.A. 25-26), and upon a guilty plea for tax evasion he received a suspended sentence of five years imprisonment, three years probation, and a fine of $5,000. (J.A. 55-56). Because of his offenses, he resigned from the bar (J.A. 24).

On Martin Frank's attempted subornation of perjury, defense counsel wanted to play for the benefit of the jury two short tapes showing Frank on his criminal course. The trial judge refused to permit them to do so (J.A. 164). This was an abuse of discretion.

This was a close case. The jury was deadlocked. Martin Frank was the government's principal witness against Levine.

The individual whom Martin Frank attempted to suborn was

one Jerome Allen. The government had Jerome Allen wired for sound. Nothing would more clearly show Frank's character than his actual voice at work in attempting to suborn perjury. Frank's actual voice on tape would have shown his criminal character far better than the prosaic monotone in which he testified at the trial. The jury was entitled to the benefit of hearing the tapes. This would have taken but a short amount of trial time.

Moreover, nothing could have been more relevant to Frank's veracity and honesty than the hearing of his voice in his attempt to suborn perjury. Rule 608(b) provides for such a course "if probative of truthfulness or untruthfulness,". In Pullman v. Hall, 55 F.2d 139 (4th Cir. 1932), the court permitted questions on cross-examination directed to false swearing in an affidavit saying, "The rule is that for the purpose of impeaching the credibility of a witness he may be questioned as to misconduct, even as to collateral matters, which has a tendency to show his lack of honesty or truthfulness." At 141.

See also Lyda v. United States, 321 F.2d 788, 793 (9th Cir. 1963) ("the use of false names bears directly enough upon the witness' veracity . . . to outweigh the general prohibition against cross-examining about particular acts of misconduct other than convictions of a crime"; United States v. Varelli, 407 F.2d 735, 751 (7th Cir. 1969) ("credibility may be attacked by extrinsic evidence or by cross-examination. The introduction of extrinsic

evidence has been limited to prior convictions. . . . However, such restriction does not appply to '[T]he extraction of the facts of misconduct from the witness himself upon cross-examination,' subject to the exceptions of relevancy and self-incrimination. Since perjury would be relevant to the witness' veracity, cross-examination should be allowed on retrial.").

McCormick, Evidence §42 at 87 (1954), views misconduct, "such as false swearing fraud and swindling" as relevant to truthfulness. Nothing could be more relevant to Martin Frank's truthfulness than his attempted subornation of perjury and nothing could better show Martin Frank's character than his voice on tapes in which he attempted the subornation.

POINT III

IT WAS ERROR FOR THE TRIAL JUDGE TO DENY THE REQUEST OF DEFENSE COUNSEL MADE IN GOOD FAITH FOR AN ADJOURNMENT OF ONLY A DAY FOR FURTHER NECESSARY PREPARATION.

On Friday, July 9, 1976 the trial Judge told counsel that the case would not go to trial until Wednesday, July 14 (J.A. 14). On Tuesday, July 13, he told them that the case was going to go to trial that day. Defense counsel strenuously objected, pointing out that he had gotten a mass of Brady v. Maryland, 373 U.S. 83 (1963) and 3500 material only the night before, Monday night, July 12 (J.A. 12), and that he could not give his client the best defense without additional time (J.A. 14). As a last request defense counsel asked the trial Judge for at least a day to go through the mass of material that he had received only on Monday night (J.A. 15). The trial Judge refused, and made counsel go to trial that afternoon. (J.A. 16). Defense counsel took an exception (J.A. 17).

There was no need or excuse for all this rush. After all, the indictment was less than two months old! As Chief Justice Warren wrote for the Court in Smith v. United States 360 U.S. 1, 19 (1959): "While justice should be administered with dispatch the essential ingredient is orderly expedition and not mere speed."

The trial Judge forced this case to trial with such undue haste that defense counsel not only did not have time to see all of the Brady matter but also did not know until after the trial that some of the Brady material which the government purported to

offer was missing. For instance, the government purported to give defense counsel a copy of a check from the Hillel School for $10,000 to Martin Frank's wife, Charlotte Frank; but did not do so. This item had a crucial bearing in this close case. Had defense counsel had this item he could have used it along with other items such as the Las Vegas night and the raffle at which Martin Frank won a cadillac which he in turn had the Hillel School change for a Lincoln Continental, in order to finish destroying Martin Frank's character.

If defense counsel had had more time they might also have discovered, as they subsequently did, that in Martin Frank's files there was a file entitled "Levine, Jack, Miscellaneous, File No. 3085", with a number of blank sheets of paper bearing in graduated places the signature of Jack Levine, each sheet positioned differently for his signature. This evidence is important for Levine was sure that he left some of his stationery signed in blank with Frank (J.A. 175-76), and Frank's testimony was to the contrary (J.A. 62).

The writer cannot help but add that the situation which developed in this case will only be worsened by the Speedy Trial Act, aptly characterized by a Federal Court of Appeals law clerk as "That can of worms." See A. Kozinski, That Can of Worms: The Speedy Trial Act, 62 A.B.A.J. 862 (1976).

CONCLUSION

In line with the spirit of the opinions of the United States Supreme Court in Smith v. United States 360 U.S. 1 (1959), and Bihn v. United States 328 U.S. 633 (1946), Jack Levine should in all fairness have a new trial so that he can truly feel that he has had his full day in court.

Respectfully submitted,

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New York, New York 10017
(212) LE. 2-6430

Attorneys for Defendant-Appellant

Of Counsel:

O. John Rogge
George Berger
Kenneth M. Katz

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

DEAN MILLER, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 2 CHARLTON ST NEW YORK, N.Y. 10014.

That on the 18 day of OCTOBER, 1976, deponent personally served the within BRIEF FOR APPELLANT upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

SEYMOUR PEDOWITZ, ESQ.
ASSISTANT UNITED STATES ATTORNEY
FOR THE SOUTHERN DISTRKT OF NEW YORK
ATTORNEY FOR PLAINTIFF-APPELLEE
1 ST. ANDREWS PLAZA
NEW YORK, N.Y.

Dean Miller

Sworn to before me this
18th day of October, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-4504505
Qualified in Bronx County
Commission Expires March 30, 1977